CHONG CHEE YAN

v.

GERMILA SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[SUIT NO: KG 65 OF 1993/II]
9 JANUARY 2001

CIVIL PROCEDURE: *Trial - Right to begin - Burden of proof of issues - Whether with plaintiff or defendant - Application for directions of court under O. 35 r. 4(6) Rules of the High Court 1980 - Whether O. 35 r. 4(6) applicable only if defendant on own accord intends to begin case*

The plaintiff sought the direction of the court under O. 35 rr. 4(1) and (6) of the Rules of the High Court 1980 ('RHC') that the defendants should begin opening their case as the burden of proof of the issues lay on the defendants. The plaintiff's claim against the 1st defendant was for the balance of monies due and owing pursuant to a letter of undertaking by the 1st defendant to the plaintiff. Pursuant to another letter of undertaking, the 2nd defendant guaranteed the due performance and fulfilment of the terms and conditions of the earlier letter of undertaking.

The defendants opposed the plaintiff's application on the ground that O. 35 r. 4(6) was only applicable if the defendants on their own accord intended to begin by opening their case. It was also submitted that the burden of proof on all the issues in this action was not on the defendants.

Held:

[1] There was hardly any authority as to the applicability of O. 35 r. 4(6) of the RHC. However, the court may give its directions under O. 35 r. 4(1) whether an action came within the provisions of O. 35 r. 4(6) or otherwise. If the facts of the case clearly attracted the application of O. 35 r. 4(6), then the court shall give the necessary directions on the application of either party to the case under O. 35 r. 4(1).

[2] The defendants were not denying the existence of the said two letters of undertaking. However, it was their contention that the said two letters were void for want of certainty in the terms as contained therein and also for want of consideration. Hence, it was for the plaintiff to prove the certainty and effect of the terms in the said letters of undertaking and also the

amount alleged to be owed by the defendants. Furthermore, it was also imperative on the part of the plaintiff to show that the said letters were not void for want of consideration.

[3] The defendants alleged that subsequent arrangements entered into between the plaintiff, defendants and other parties vitiated the undertakings given by the defendants. In the circumstances, the burden of proof was reposed on the plaintiff to establish that the two letters could be legally enforced against the defendants. In conclusion, it could not be said that all the issues in this case were to be established by the defendants.

[Application dismissed; plaintiff to begin by opening case.]

Case(s) referred to:
Grunther Industrial Development Ltd v. Federated Employers Insurance Association Ltd [1973] 1 Lloyd's Report 394 ***(refd)***
Re the Estate of Parry (deceased), Parry v. Fraser & Anor [1997] 1 All ER 309 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 35 rr. 4(1), (6)

Other source(s) referred to:
Mallal's Supreme Court Practice, 2nd edn, vol 1, p 427

For the plaintiff - RR Sethu (James Lo with him); M/s George Lo & Partners
For the defendant - Lee Chuan Eng; M/s Ee & Lim

Reported by Suhainah Wahiduddin

JUDGMENT

Zakaria Sam JC:

The plaintiff through a letter dated 17 July 2000 (encl. 142) sought for the directions of this court under O. 35 r. 4(1) of the Rules of the High Court 1980 that the defendants begin by opening their case as the burden of proof of the issues lies on the defendants.

Essentially the claim of the plaintiff against the 1st defendant is for the sum RM2 million being the balance of monies due and owing pursuant to a letter of undertaking given by the 1st defendant to the plaintiff dated 6 July 1988.

Pursuant to another letter of undertaking dated 12 July 1988, the 2nd defendant guaranteed the due performance and fulfilment of the terms and conditions of the earlier letter of undertaking.

It is also the allegation of the plaintiff that out of the amount of RM3 million due and owing pursuant to the letter of undertaking dated 6 July 1988, a sum of RM1 million had been paid as part-payment to the plaintiff.

In the course of his submission, the learned counsel for the plaintiff referred this court to O. 35 r. 4(6) which provides:

> (6) **Where the burden of proof of all the issues in the action lies on the defendant** or, where there are two or more defendants and they appear separately or are separately represented, on one of the defendants, **the defendant** or that defendant, as the case may be **shall be entitled to begin**, and in that case paragraphs (2), (3) and (4) shall have effect in relation to, and as between, him and the plaintiff as if for references to the plaintiff and the defendant there were substituted references to the defendant and the plaintiff respectively. (Emphasis supplied)

The learned counsel for the plaintiff reiterated that the defendants should begin by opening their case by virtue of O. 35 r. 4(6).

On the other hand, the learned counsel for the defendants in opposing the plaintiff's application explained that O. 35 r. 4(6) would only be applicable in this action if the defendant on their own accord intended to begin by opening their case. In furtherance thereto, it was also submitted that the burden of proof on all the issues in this action is not on the defendants.

There is hardly any authority as to the applicability of O. 35 r. 4(6). However, the court may in a given situation exercise its discretion to give special direction under O. 35 r. 4(1) as explained in the case of *Re the Estate of Parry (deceased), Parry v. Fraser and Anor* [1997] 1 All ER 309 where it was held that:

> I think that the discretion of the judge under Ord 35 to give a special direction should not be fettered by attempting to lay down classes of case in which it will be proper to depart from the perfectly plain situation which prevails under Ord 35 r. 7(2) and (6).
>
> (Order 35 r. 7(2) and (6) of the RSC are equivalent to our Order 35 rule 4(2) and (6) of the Rules of the High Court).

In this context, the learned editor of the *Mallal's Supreme Court Practice*, vol. 1 (2nd edn) at p. 427 explains the effect of O. 35 r. 4(1) as follows:

> This rule confers on the trial judge the power to give directions (i) as to the party to begin and (ii) as to the order of speeches at the trial. Generally, the party should begin on whom the burden of proof on the pleadings lies: *Seldon v. Davidson* [1968] 1 WLR 1083; [1968] 2 All ER 755 CA.

From the abovesaid two passages, one can surmise that the court may give its directions under O. 35 r. 4(1) of the Rules of the High Court whether an action comes within the provisions of O. 35 r. 4(6) or otherwise. If the facts of the case clearly attract the application of O. 35 r. 4(6), then the court shall give the necessary directions on the application of either party to the case under O. 35 r. 4(1).

As adverted to earlier, generally, the party on whom the burden of proof of pleadings lies should begin. This rationale is also consonant with the provisions of O. 35 r. 4(6). Hence, by virtue of logical postulation, the question as to whom the burden of proof of an issue lies must depend on the construction of the pleadings. At this juncture, it is useful to refer to the case of *Grunther Industrial Development Ltd v. Federated Employers Insurance Association Ltd* [1973] 1 Lloyd's Report 394 where Roskil LJ after having agreed to the decision of Cairns LJ held that:

> ... the substantial issue in this case is on the question of fraud raised by the defendants. That in the event may well prove to be so; but that, in my judgment, does not in the least determine upon whom is the obligation to open the case. For that it is necessary to look at the pleadings, and when one looks at the pleadings one finds that the statement of claim alleges a loss under a consequential loss policy of fire insurance. The defence first of all requires the production of that policy as a condition precedent to its admission; and, secondly, puts in issue the loss. Therefore it seems to me that before there can be any question of the issue of fraud arising here, the plaintiffs must first of all produce the original policy, because otherwise, without its production, the claim fails in limine; and, secondly, the plaintiffs must prove some loss even though it is agreed that liability only is to be determined at the trial; because without proof of some loss there could be no cause of action in any event.

In the present case, the defendants are not denying the existence of the two letters of undertaking dated 6 July 1988 and 12 July 1988 respectively, however, it is their contention that the said two letters are void for want of certainty in the terms as contained therein and also for want of consideration. Hence, it is for the plaintiff to prove the certainty and effect of the terms in the two letters and also the amount alleged to be owing by the defendants in the sum of RM3 million. Furthermore, it is also imperative on the part of the plaintiff to show that the two letters are not void for want of consideration.

The defendants in their defence are also alleging that subsequent arrangements entered into between the plaintiff, defendants and various other parties vitiated the undertakings given by the defendants, the particulars of which are stated in paras. 9(i) to (viii) of the defence. These allegations would certainly effect

the enforceability of two letters of undertaking. In the circumstances, the burden of proof is then reposed on the plaintiff to establish that the two letters could be legally enforced against the defendants.

Finally, there is also this issue of RM1 million which the plaintiff alleged to be part-payment forwarded by the defendants to the plaintiff.

In conclusion, having perused through the pleadings of both the plaintiff and defendants, it could not be said that all the issues in this case are to be established by the defendants.

Hence, upon the foregoing reasons, I ordered that the plaintiff is to begin by opening his case and the application of the plaintiff to be dismissed with costs to the defendants and to be taxed unless agreed.